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ORIGINAL

No. 93-5209

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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OCTOBER TERM, 1992

DARREN J. CUSTIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant may challenge, in a federal sentencing proceeding, the constitutional validity of prior convictions offered by the government for sentencing enhancement under the Armed Career Criminal Act.

2. Whether attempted breaking and entering is a "violent felony" for purposes of sentencing enhancement under the Armed Career Criminal Act.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

The Petitioner, Darren J. Custis, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 988 F.2d 1355. The opinion of the district court (App. 11a-16a) is reported at 786 F. Supp. 533 (D. Md. 1992).

JURISDICTION

The judgment of the Fourth Circuit was entered on March 22, 1993. A Petition for Rehearing was filed on April 5, 1993. The Petition for Rehearing was denied on April 30, 1993, with four judges voting to hear the case in banc, infra 10a. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution are reproduced at App. 17a. The relevant provisions of 18 U.S.C. sections 921, 922, and 924 (Supp. 1993), 18 U.S.C. section 3661 (1985), and Maryland Annotated Code article 27, section 31A (1992) are reproduced at App. 17a-18a.

STATEMENT OF THE CASE

On September 11, 1991, Petitioner Darren J. Custis was indicted in the United States District Court for the District of Maryland for possession of cocaine with intent to distribute, in violation of 21 U.S.C. section 841(a)(1)(Count one); use of a firearm in connection with a drug trafficking offense, in violation of 18 U.S.C. section 924(c)(Count two); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. section 922(g)(1)(Count three). A jury found Mr. Custis not guilty of possession with intent to distribute (Count one) and use of a firearm during a drug offense (Count two), but guilty of possession of a firearm by a convicted felon (Count three) and simple possession of cocaine, a misdemeanor and lesser included offense of count one. The district court had jurisdiction under 18 U.S.C. section 3231.

At sentencing, the government sought application of 18 U.S.C. section 924(e)(1), which mandates a prison sentence of at least fifteen years without parole if a defendant convicted under 18 U.S.C. section 922(g) "has three previous convictions . . . for a violent felony or a serious drug offense . . . ." The government

offered three prior convictions rendered by state courts in Pennsylvania and Maryland as predicates for imposition of the mandatory minimum sentence: (1) a 1985 conviction in Pennsylvania state court for robbery; (2) a 1985 conviction in Maryland state court for burglary; and (3) a 1989 conviction in Maryland state court for attempted breaking and entering. Mr. Custis asserted that the statutory minimum penalty did not apply, because both Maryland convictions relied on by the government were constitutionally invalid.

Mr. Custis asserted that his 1985 guilty plea to burglary was not knowingly and voluntarily made and resulted from a denial of effective assistance of counsel. The plea was not knowing or voluntary because Mr. Custis's attorney failed to provide him with information about possible defenses, and Mr. Custis pleaded guilty out of his resulting ignorance. Mr. Custis submitted the transcript of the guilty plea, which showed that he could have asserted a defense, that his lawyer did not advise him of any possible defenses, and that he was "confus[ed]" during the guilty plea proceeding.[1] Mr. Custis asserted that if he had known of his

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[1] The transcript records the following colloquy:

THE COURT: Has [your lawyer] given you certain advice as to whether or not to plead guilty, whether or not to accept the agreement? Has she given you that advice?

THE DEFENDANT: Somewhat.

THE COURT: Has she told you in the past the possible defense you might have in this case?

THE DEFENDANT: No.

possible defenses in the earlier case, he would have exercised his right to stand trial.

Mr. Custis also challenged on two grounds the 1989 conviction for attempted breaking and entering. That conviction was entered upon a "stipulated facts trial." Mr. Custis submitted a five page transcript of that proceeding. Mr. Custis argued that a stipulated facts trial is the equivalent of a guilty plea, that the transcript did not establish a knowing and voluntary plea, and that the proceeding was fundamentally unfair. In addition, Mr. Custis contended that the 1989 conviction could not in any event be used to enhance his sentence because attempted breaking and entering is not a "violent felony" within the meaning of 18 U.S.C. section 924(e)(Supp. 1993).

If either of the two convictions Custis challenged was not used for enhancement under 18 U.S.C. section 924(e), the guideline sentencing range would have been 33 to 41 months, and the statutory maximum under 18 U.S.C. section 924(a)(2) would have been ten years. Counting all three convictions, the statutory minimum

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THE COURT: She has not told you what defenses you might have had or that you didn't have any?

THE DEFENDANT: No.

THE COURT: Has she discussed the case with you?

THE DEFENDANT: Yes, somewhat, but it's been confusing.

THE COURT: What's been confusing?

THE DEFENDANT: The whole thing really has been confusing.

Record, Paper No. 42, Exhibit 1, pp. 19-20.

sentence was fifteen years, and the armed career criminal sentencing guideline prescribed a sentencing range of 235 to 293 months.[2]

The district court refused to consider Custis's constitutional challenges, ruling that a challenge to prior convictions would not be allowed unless the defendant had no legal representation at all. App. 13a-15a. Accordingly, the court refused to take evidence or to make findings on the validity of the prior convictions. The court also rejected Custis's argument that the prior conviction for attempted breaking and entering is not a violent felony. Counting all three prior convictions as violent felonies, the court imposed a sentence of 235 months on count three (the minimum sentence prescribed by the guidelines for defendants to whom the ACCA applies), and a concurrent sentence of 12 months on the misdemeanor drug offense.

The court of appeals affirmed in part, reversed in part, and remanded.[3] The court allowed that the Constitution forbids imposition of a mandatory minimum sentence based on a prior conviction that resulted from a complete denial of counsel. App.

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[2] The federal sentencing guideline for armed career criminals, guideline § 4B1.4, applies only to "[a] defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. section 924(e)." United States Sentencing Commission, Guidelines Manual, § 4B1.4(a)(Nov. 1990). Thus, the counting of Custis's invalid convictions under the statute was dispositive of his guideline sentencing range.

[3] Apart from the sentencing rulings discussed above, the district court ordered a new trial on grounds that two key prosecution witnesses had been indicted for perjury. App. 16a. The Fourth Circuit reversed the grant of a new trial. App. 5a-6a.

6a-7a. It believed, however, that violations of Gideon v. Wainwright, 372 U.S. 335 (1963) are "different in kind" from the claims of ineffective assistance of counsel and unknowing pleas of guilt that Custis asserted. App. 6a. The court opined that permitting such claims "would place a substantial burden" on prosecutors and district judges, and that such claims would delay and complicate the sentencing process. App. 7a. In addition, the court stated that permitting federal defendants to assert constitutional challenges to prior convictions during sentencing would impair the values of comity and federalism. App. 7a. Acknowledging that such challenges would not directly affect the state convictions, the court opined that a state court conviction "commands respect, in whatever forum and for whatever purposes it has come under challenge." App. 7a.

The court therefore announced that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." App. 8a. The court held that a district court need not consider whether prior convictions were obtained in violation of the right to effective assistance of counsel or whether they were obtained through an unknowing and involuntary guilty plea, because establishing either type of claim entails a "fact-intensive inquiry." App. 8a-9a. The

court noted that if Mr. Custis successfully pursued his claims in state and federal courts through post-conviction and habeas proceedings, he might then seek revision of his federal sentence. App. 9a.

In addition, the court of appeals rejected Mr. Custis's argument that attempted breaking and entering is not a "violent felony" under 18 U.S.C. section 924(e)(2)(B)(ii)(Supp. 1993). App. 9a-10a. In so ruling, the court did not examine the statutory elements of attempted breaking and entering, but instead relied on its belief that "[i]n most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home." App. 10a (emphasis supplied). Based on that belief, the court decided that attempted breaking and entering "presents a serious potential risk of physical injury to another" and therefore constitutes a violent felony. Id.

REASONS FOR GRANTING THE PETITION

1. A Defendant must be permitted to challenge the constitutional validity of prior convictions offered by the government for sentencing enhancement under the Armed Career Criminal Act

This Court has held that use of constitutionally invalid prior convictions to enhance a sentence violates the Constitution. In Burgett v. Texas, 389 U.S. 109, 115 (1967), the Court held that a conviction obtained in violation of Gideon v. Wainwright[4] may not "be used against a person either to support guilt or enhance punishment for another offense." The Court reasoned that allowing

[4] 372 U.S. 335 (1963).

such use of the prior conviction would not only erode the principle of Gideon, but also force "the accused in effect [to] suffer anew from the deprivation of that Sixth Amendment right." Id. In United States v. Tucker, 404 U.S. 443 (1972), the Court held that a defendant was entitled to resentencing because the federal district court had based his sentence for bank robbery on three prior state convictions resulting from proceedings in which he had not been represented by counsel. The Court explained that the question was not whether the outcomes of the state proceedings might have been different if Tucker had had counsel. 404 U.S. at 447-48. Rather, the question was whether the federal sentencing judge might have imposed a different sentence if the sentencing judge had known about the unconstitutionality of the prior convictions. Adopting the reasoning of Burgett, the Court explained that erosion of Gideon could be prevented only by ordering resentencing. Tucker, 404 U.S. at 449.

Seven federal circuits have recognized that a defendant may challenge, in a federal sentencing proceeding, the constitutional validity of prior state convictions offered by the government for sentencing enhancement under the Armed Career Criminal Act. The First, Third, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have recognized that constitutional violations other than Gideon violations -- including the very violations Custis asserted below -- are equally improper for a sentencing court to overlook when prior convictions are offered for sentencing enhancement under the ACCA. United States v. Paleo, 967 F.2d 7, 11 (1st Cir.

1992)(permitting challenge on grounds that two convictions were obtained in violation of Boykin v. Alabama, 395 U.S. 238 (1969), and one involved a constitutionally inadequate resentencing) United States v. Preston, 910 F.2d 81, 87-89 (3rd Cir. 1990), cert. denied, 498 U.S. 1103 (1991)(conflict of interest by defense counsel); United States v. Taylor, 882 F.2d 1018, 1031 (6th Cir. 1989), cert. denied, 496 U.S. 907 (1990)(guilty plea not knowing and voluntary); United States v. Gallman, 907 F.2d 639, 642-45 (7th Cir. 1990), cert. denied, 111 S. Ct. 1110 (1991)(guilty plea not knowing and voluntary); United States v. Day, 949 F.2d 973, 981-84 (8th Cir. 1991)(failure to hold competency hearing); United States v. Clawson, 831 F.2d 909, 914-15 (9th Cir. 1987), cert. denied, 488 U.S. 923 (1988)(ineffective assistance of counsel); United States v. Franklin, 972 F.2d 1253, 1257-58 (11th Cir. 1992)(guilty plea not knowing and voluntary).[5]

The Fourth Circuit's opinion improperly limits this Court's decisions in Burgett and Tucker to claims that a defendant was

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[5] The federal circuits are also divided on the related question of whether to allow constitutional challenges to prior convictions when offered for enhancement under the federal sentencing guidelines. Some circuits require or permit district courts to examine the constitutional validity of prior convictions used under the federal sentencing guidelines. E.g., United States v. Brown, 991 F.2d 1162, 1165-66 (3rd Cir. 1993); United States v. Vea-Gonzalez, 986 F.2d 321, 327-29 (9th Cir. 1993); United States v. Canales, 960 F.2d 1311, 1315 (5th Cir. 1992); United States v. Jakobetz, 955 F.2d 786, 805 (2d Cir.), cert. denied 113 S. Ct. 104 (1992). Other circuits have limited such inquiries, United States v. Roman, 989 F.2d 1117, 1120 (11th Cir. 1993)(district courts cannot examine constitutional validity of prior convictions unless defendant shows conviction presumptively void), or refused to permit them. United States v. Hewitt, 942 F.2d 1270, 1276 (8th Cir. 1991).

completely deprived of counsel. In permitting defendants who were without counsel to challenge the constitutionality of a prior conviction, while denying defendants who suffered ineffective assistance of counsel and other constitutional violations the same opportunity, the Fourth Circuit has created an arbitrary scheme for determining what defendants will be subject to the mandatory minimum fifteen year sentence under the ACCA. Contrary to this Court's teachings in Burgett and Tucker, this scheme erodes constitutional principles and forces defendants to "suffer anew" from the deprivation of their constitutional rights.

As the court below was compelled to acknowledge, the right to counsel is a fundamental right of criminal defendants, Gideon v. Wainwright, 372 U.S. 335, 344 (1963), and "assures the fairness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). But in distinguishing Custis's claim of ineffective assistance of counsel, the court failed to recognize that the right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685 (1984). Moreover, the mere presence of an ineffective lawyer does little to diminish the unreliability of resulting convictions, the concern underlying this Court's decision in Gideon. Thus, imposition of a mandatory minimum sentence based on a conviction obtained in violation of the right to effective

assistance of counsel erodes the principle of Gideon and forces the defendant to "suffer anew" from the earlier constitutional violation. The reasoning of Burgett and Tucker is therefore fully applicable here.

Likewise, the acceptance of a plea of guilt which is not knowing and voluntary deprives the defendant of the most fundamental federal rights that the Bill of Rights guarantees persons accused of a crime, including the privilege against self-incrimination, right to trial by jury, and right to confront adverse witnesses. Boykin v. Alabama, 395 U.S. 238 (1969). Absent a knowing and voluntary waiver, a conviction resulting from the deprivation of these fundamental constitutional rights is wholly unreliable.

The Fourth Circuit held that neither of these claims merited consideration, however, because each entailed a "fact-intensive inquiry." App. 8a-9a. Because the demonstration of any constitutional violation requires some degree of factual showing, it appears that virtually all challenges could be barred under the Fourth Circuit's test. The Fourth Circuit's standard might bar from consideration even those constitutional errors which this Court has identified as "structural" in nature.[6]

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[6] See, e.g., Vasquez v. Hillery, 474 U.S. 254, 264 (1986)(racial discrimination in grand jury selection); McKaskle v. Wiggins 465 U.S. 168, 177 n.8 (1984)(violation of the right to self representation); Tumey v. Ohio, 273 U.S. 510, 535 (1927)(trial by biased judge). Each of these claims could require a more intensive examination of facts outside the record than the claims Custis attempted to assert here.

Nothing in the ACCA required the restriction imposed by the Fourth Circuit on a sentencing court's consideration of the validity of prior convictions. As the First Circuit has explained, the language of the statute does not dictate that the term "convictions" be construed as including unconstitutional as well as constitutional convictions. United States v. Paleo, 967 F.2d 7, 14 (1st Cir. 1992)(Breyer, C.J.)(interpreting "convictions" in section 924(e) to include "constitutionally valid" convictions, not unconstitutional convictions). Enacting the penalty enhancement provision in 1984 against the backdrop of this Court's rulings in Burgett and Tucker, Congress may well have thought the alternative phrase "valid convictions" a redundancy. Indeed, even the court below recognized that the term "conviction" must exclude some invalid convictions, for it expressly allowed for challenges based on Gideon. Its allowance of some challenges apparently recognizes that an interpretation treating all convictions as qualifying for sentencing enhancement would offend due process and therefore is not plausible.

In addition, the Fourth Circuit's ruling conflicts with 18 U.S.C. section 3661 (1985), which provides that the sentencing court's power to consider relevant information is unlimited:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Information concerning the validity of a defendant's prior convictions bears directly on their reliability as evidence of

recidivism and therefore is critical to fully informed sentencing.[7] By foreclosing consideration of such information and punishing the defendant more severely on account of convictions that are themselves fruits of earlier constitutional violations, the Fourth Circuit's ruling cannot be squared either with the sentencing scheme Congress adopted or with rudimentary concerns of due process.

2. Principles of comity and federalism support review

The decision below appears to be driven chiefly by values of comity and federalism. App. at 10-11. To preserve these values, the court of appeals attempted to impose an exhaustion requirement, suggesting that if Mr. Custis pursued relief in state and federal post-conviction proceedings, then, perhaps, he might seek resentencing in this case. The Fourth Circuit stands alone among the circuits in requiring exhaustion of state remedies before permitting consideration of the unconstitutionality of prior convictions offered to enhance a sentence under the ACCA.

The Fourth Circuit's comity concerns are misguided for three reasons. First, Maryland has expressly invited other jurisdictions

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[7] In Lewis v. United States, 445 U.S. 55 (1980), the Court ruled that a conviction not previously ruled invalid may be used as a basis for a statutory prohibition against possession of firearms. Unlike this case, Lewis involved the statutory elements of an offense, not a sentencing enhancement scheme, so that Burgett and Tucker were not implicated. The Lewis opinion reflects the need for prospective knowledge of whether possession of firearms is permitted. The only question in this case is how severely a person convicted of a crime is to be punished on account of prior convictions. Therefore, no similar consideration precludes judicial review of convictions prior to their use for sentencing enhancement.

to examine the validity of convictions obtained in its courts before using them for sentencing enhancement. In McMannis v. State, 311 Md. 534, 536 A.2d 652 (1988), the Maryland Court of Appeals refused to consider a post-conviction petition brought by a defendant who had been sentenced as a recidivist in another jurisdiction, because his Maryland sentence had expired and he was no longer in custody. The court held that "[w]hen a challenge to the validity of a foreign predicate conviction is lodged, we believe it is the jurisdiction utilizing that foreign conviction for enhancement of sentence which should bear the responsibility of resolving that controversy." 311 Md. at 544, 536 A.2d at 657. In view of this invitation, the comity concerns on which the Fourth Circuit relied do not exist. Simply put, state courts do not wish to be burdened with constitutional challenges filed by federal defendants. While recognizing that consideration of such claims by sentencing courts is appropriate, the state has no interest in the length of a federal defendant's sentence. The Fourth Circuit's opinion undermines comity considerations by burdening busy state courts with litigation on federal questions in which the state has no interest.

Second, the exercise of federal judicial power in federal sentencing hearings does not involve assertion of federal jurisdiction over a state criminal case. United States v. Paleo, 967 F.2d 7, 12 (1st Cir. 1992). Considerations of comity are not compelling when a federal court's examination of the state conviction does not free a state prisoner or otherwise interfere

with the state's authority. Mr. Custis merely informed a federal court that the exercise of federal punitive power should not be based on judgments resulting from an earlier constitutional violation. There are no costs to the state from a review of state court convictions in this limited fashion. Cf. Kimmelman v. Morrison, 477 U.S. 365, 379 (1986).

Third, contrary to the Fourth Circuit's assumption, there is no state forum for Mr. Custis's constitutional challenges. A post-conviction petition may be filed in Maryland only if the petitioner is incarcerated or under parole or probation supervision in connection with the conviction at issue. See Md. Ann. Code art. 17, section 645A(a)(1992). As will usually be the case, Mr. Custis completed his state term of incarceration before being charged under the ACCA. The Fourth Circuit's opinion leaves a large class of defendants, like Mr. Custis, with no means of preventing the imposition of a mandatory minimum sentence based on an earlier constitutional violation. For these reasons, the comity concerns underlying the Fourth Circuit's opinion are illusory.[1]

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[1] The Fourth Circuit's opinion also reflects concern about burdens on prosecutors and district judges from permitting constitutional challenges to prior convictions. But as the First Circuit observed in Paleo, a rule requiring federal courts to assume that past convictions are valid "would likely increase delay, as defendants are sent from one court to another to press their various challenges." 967 F.2d at 13. The seven circuits that permit such challenges apparently have not experienced the problems that concerned the court below. To the extent that such problems exist, they can be substantially alleviated through burden-shifting rules of proof and procedural rules that guide the consideration of constitutional challenges. See Parke v. Raley, 113 S. Ct. 517, 525-26 (1992)(not fundamentally unfair to require a defendant to produce evidence of noncompliance with Boykin when no transcript exists). See also United States v. Paleo, 967 F.2d

3. The ruling that attempted breaking and entering is a violent felony conflicts with decisions of other federal circuits and stems from a failure to follow a decision of this Court

The Fourth Circuit's ruling that attempted breaking and entering is a "violent felony" under the ACCA adds to a split in the circuits on whether attempt crimes are crimes of violence for purposes of the ACCA. Contrary to the decision below, the Fifth and Tenth Circuits have held that attempted burglary is not a violent felony under the ACCA. United States v. Martinez, 954 F.2d 1050, 1053-54 (5th Cir. 1992); United States v. Strahl, 958 F.2d 980, 985-86 (10th Cir. 1992). Three other circuits have reached the opposite conclusion. United States v. Lane, 909 F.2d 895, 902-03 (6th Cir. 1990), cert. denied, 111 S. Ct. 977 (1991); United States v. O'Brien, 972 F.2d 47, 52 (3d Cir. 1992); United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992).

The statute defines the term "violent felony" as one that "involves conduct that presents a serious potential risk of physical injury to another" under 18 U.S.C. 924(e)(2)(B)(ii). In Taylor v. United States, 495 U.S. 575, 602 (1990), this Court interpreted that definition as requiring the sentencing court "to look only to the fact of conviction and the statutory definition of

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7, 13 (1st Cir. 1992)(defendant bears burden of proving the invalidity of a prior conviction); United States v. Day, 949 F.2d 973, 982-83 (8th Cir. 1991)(same); United States v. Ruo, 943 F.2d 1274, 1276 (11th Cir. 1991)(same) United States v. Gallman, 907 F.2d 639, 643-645 (7th Cir. 1990), cert. denied, 111 S. Ct. 1110 (1991)(same).

the prior offense," not to the particular facts underlying the conviction. Taylor, 495 U.S. at 602. This categorical approach ensures uniformity and avoids a sentencing scheme in which "a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." Id. at 601.

The Fourth Circuit did not apply the categorical approach that Taylor requires. Instead of examining the statutory elements of attempted breaking and entering, the court focused on the fact that the offense of completed breaking and entering involves entry into "the dwelling house of another" and on its belief that "[i]n most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home." App. 10a (emphasis supplied).

Application of the Taylor analysis demonstrates that as defined by Maryland law, attempts are not violent felonies. In Maryland, the offense of criminal attempt is a common law misdemeanor. Young v. State, 303 Md. 298, 301, 493 A.2d 352, 353 (1985). Maryland has adopted the Model Penal Code's "substantial step" test for attempts. Under that test, the state need only prove: (1) a substantial step toward commission of the crime, and (2) intent to commit the crime. Young, 303 Md. at 311, 493 A.2d at 359. Because any "substantial step" suffices, no unlawful entry is required. The defendant need do no more than possess materials intended to be employed in the commission of the crime, such as a floor plan or a key, even if they are not possessed at or near the place contemplated for commission of the crime. Likewise, merely

scouting out an area with intent to return later also suffices under the substantial step test. 303 Md. at 312, 493 A.2d at 359. In fact, Maryland adopted the substantial step test precisely because it enables the police to intervene at such early stages. 303 Md. at 314, 493 A.2d at 360.

Because attempted breaking and entering need not involve entry into a dwelling, a substantial risk of confrontation is not inherent in the crime. Indeed, the offense can take place long before the offender encounters any other person, and without the offender being in the vicinity of the building. Therefore, under the categorical approach this Court adopted in Taylor, attempted breaking and entering does not, by its very nature, pose a serious potential risk of physical injury to another, and does not constitute a violent felony under the ACCA. United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992); United States v. Strahl, 958 F.2d 980 (10th Cir. 1992).

Approximately half of the states and a majority of the federal circuits have adopted the substantial step test in some form by legislation or judicial action. Young v. State, 303 Md. at 314, 493 A.2d at 361 (1985)(compiling cases and statutes). The issue presented thus has substantial importance far beyond the borders of Maryland and the Fourth Circuit. Certiorari should be granted to establish uniformity on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 14, 1993

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Darren J. CUSTIS, Defendant-Appellee.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Darren J. CUSTIS, Defendant-Appellant.

Nos. 92-5211, 92-5212.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 4, 1992.

Decided March 22, 1993.

As Amended April 6, 1993.

Order Denying Rehearing and Rehearing En Banc April 30, 1993.

After defendant's conviction for possession of firearm and possession of cocaine, the United States District Court for the District of Maryland, Frederic Nelson Smalkin, J., 786 F.Supp. 533, granted new trial, and government appealed. Defendant cross-appealed sentence enhancement. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) subsequent indictment of police officer witnesses for perjury did not entitle defendant to new trial; (2) trial court could refuse to entertain constitutional challenges to predicate state convictions for sentencing as armed career criminal; and (3) attempted breaking and entering was "violent felony" for sentence enhancement purposes.

Affirmed in part, reversed in part, and remanded with instructions.

1. **Criminal Law ⇐942(1)**

While new evidence going only to credibility of witness does not generally warrant granting of new trial, there may exceptional rare case that would justify new trial solely on basis of newly discovered impeachment evidence.

2. **Criminal Law ⇐942(1)**

Subsequent indictment of two police officer witnesses for perjury did not warrant new trial; indictment involved unrelated case with issues that had no bearing on defendant's trial, charges against officers were mere allegations, indictments were dismissed, and officers' account of events leading to defendant's arrest was corroborated by testimony of third officer and, to some extent, testimony of defendant himself.

3. **Criminal Law ⇐1202.10(2), (4)**

Fact that district court acts scrupulously in determining that defendant's right to counsel was observed in proceedings leading to predicate state convictions for sentencing as armed career criminal does not oblige it to take evidence on defendant's other constitutional challenges to those convictions, as complete deprivation of counsel is different in kind from other constitutional errors; when defendant is deprived of counsel, he has lost ability to assert all other constitutional rights, and requiring district courts to entertain other fact-intensive constitutional claims would present practical difficulties and impair values of comity and federalism. 18 U.S.C.A. § 924(e)(1); U.S.C.A. Const.Amend. 6.

4. **Criminal Law ⇐1202.10(4)**

District courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from alleged constitutional violation, regardless of facts of particular case, and when right asserted is so fundamental that its violation would undercut confidence in guilt of accused.

5. **Criminal Law ⇐641.13(1)**

In order to make out claim of ineffective assistance of counsel, defendant must show that counsel's errors prejudiced his defense. U.S.C.A. Const.Amend. 6.

6. **Criminal Law ⇐1202.10(4)**

District court could refuse to entertain defendant's claim that predicate state conviction for sentencing as armed career criminal was obtained in violation of his right to effective assistance of counsel; counsel's errors do not carry presumption of prejudice, but, rather, defendant must show that alleged errors prejudiced defense, and finding of prejudice entails fact-intensive inquiry, requiring extensive reference to record in state proceeding. 18 U.S.C.A. § 924(e)(1); U.S.C.A. Const. Amend. 6.

7. **Criminal Law ⇐1202.10(4)**

While prejudice to defendant can be presumed on direct appeal when record does not affirmatively demonstrate that defendant's plea of guilt was knowing, that presumption does not carry over when defendant attacks intelligence of his plea collaterally.

8. **Criminal Law ⇐997.15(2)**

When defendant is represented by counsel when making his guilty plea, that plea is presumed valid when later attacked in habeas corpus proceeding. 28 U.S.C.A § 2255.

9. **Criminal Law ⇐997.15(2)**

To overcome, in habeas corpus proceedings, strong presumption of validity of counseled guilty plea, defendant must make factual showing that his plea was not voluntary and intelligent. 28 U.S.C.A. § 2255.

10. **Criminal Law ⇐1202.10(4)**

District court could refuse to entertain defendant's claim that state predicate convictions for sentencing as armed career criminal were obtained without knowing plea of guilt; defendant was required to make factual showing that his plea was not voluntary and intelligent to overcome presumption of validity of counseled guilty plea and appropriate forum for such fact-intensive showing was in state collateral proceeding or federal habeas corpus proceedings, not at sentencing hearing for separate offense far removed from original conviction. 18 U.S.C.A. § 924(e)(1).

11. **Criminal Law ⇐1202.10(4)**

If defendant is successful in making state or federal collateral attack on state

sentence, he may seek to revise any federal sentence in which state conviction was factor.

12. Criminal Law ⇐1202.3(1)

In determining whether prior conviction is violent felony for purposes of sentencing as armed career criminal under categorical approach, looking only to statutory definition of offense, courts must make commonsense judgments about whether given offense proscribes generic conduct with potential for serious physical injury to another. 18 U.S.C.A. § 924(e), (e)(2)(B)(ii).

13. Criminal Law ⇐1202.3(1)

Attempted breaking and entering is "violent felony" for purposes of sentencing as armed career criminal; in most cases, attempted breaking and entering will be charged when defendant has been interrupted in course of illegally entering home and interrupting intruder involves risk of confrontation nearly as great as finding him inside home. 18 U.S.C.A. § 924(e), (e)(2)(B)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

Thomas Michael DeBiagio, Asst. U.S. Atty., Baltimore, MD (Richard D. Bennett, U.S. Atty., Robert E. Sims, Asst. U.S. Atty., on brief), for appellant.

Mary Melissa French, Asst. Federal Public Defender, Baltimore, MD (Anthony R. Gallagher, Acting Federal Public Defender, on brief), for appellee.

Before RUSSELL and WILKINSON, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WILKINSON, Circuit Judge:

In this case, Darren Custis claims (1) that he is entitled to a new trial on the basis of newly discovered impeaching evidence; (2) that he is entitled to have the constitutionality of several predicate state convictions considered in his federal sentencing proceeding; and (3) that his prior conviction for attempted breaking and entering should not have been defined as a violent felony for purposes of the sentencing enhancement under 18 U.S.C. § 924(e). For the reasons that follow, we reverse the district court's granting of a new trial and remand this case with instructions to reinstate the judgment of conviction. We find no error, however, in that court's treatment of the defendant's predicate state convictions, nor in its determination that defendant was eligible for sentence enhancement as an armed career criminal. We thus affirm the sentence imposed upon defendant.

I.

Darren Custis was arrested on July 1, 1991 by Baltimore City Police Officers Christopher Wade and John Mohr. Pursuant to "Operation Triggerlock," a federal effort to crack down on the use of firearms by convicted felons, Custis was indicted by a federal grand jury on three counts: (1) possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1); (2) use of a firearm in connection with a drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The government gave notice that it would seek an enhanced penalty for the section 922(g)(1) offense under 18 U.S.C. § 924(e)(1), which provides for a minimum fifteen-year sentence for defendants who have three prior convictions for a violent felony or a serious drug offense. The notice listed state convictions for burglary, attempted burglary, and robbery as predicate offenses for the sentence enhancement.

At trial, three Baltimore City Police Officers testified on behalf of the government: the arresting officers, Christopher Wade and John Mohr, and an officer who interviewed Custis the morning after his arrest, Louis Hopson. Wade testified that at around 5:00 P.M. on July 1, he and Mohr approached the intersection of Springhill Avenue and Towanda, an area known to be the site of extensive drug dealing. Four or five individuals were standing on the corner in front of a convenience store, the Springhill Market. As the officers approached, one of the individuals called out "5-0," a warning that police officers were nearby. Custis went into the Springhill Market, and the officers followed.

Wade testified that he heard a "loud thump" just before he entered the store. As he entered, Custis was coming up from a crouched position between two video machines. Wade ordered Custis to stop and told Mohr, who was entering behind him, to hold Custis. Wade then investigated the area where Custis had been standing and found a .38 caliber Smith & Wesson revolver. The officers then arrested Custis. As he was being arrested, Custis dropped a small bag of cocaine and said "OK, you got it." Wade then looked around the video machines, where he found eighteen additional bags of cocaine. Custis asked Wade for what he was being arrested, and Wade told him that he was being arrested for possessing cocaine and a handgun. According to Wade, Custis responded, "I will take the cocaine charges but I'm not taking the gun charge." Officer Mohr largely corroborated Wade's testimony.

Officer Hopson testified that he interviewed Custis the morning after his arrest. According to Hopson, Custis initially denied that the gun and drugs were his, but he later admitted that the gun was his and that he worked as an "enforcer" for a drug dealer named "Easy." Hopson did not take a written statement from Custis.

Custis testified on his own behalf. He admitted purchasing the one bag of cocaine in his possession when he was arrested, but denied possessing the gun or the remaining eighteen bags of cocaine. Custis claimed that he had dropped the one bag of cocaine and was picking it up when Wade stopped him. Custis acknowledged that he told Wade he would take the drug charge but not the gun charge. Custis claimed, however, that he meant only the one bag of cocaine that he dropped while being arrested. Custis also denied telling Hopson that the gun was his or that he worked as an "enforcer."

The jury found Custis not guilty of possession with intent to distribute and not guilty of use of a firearm during a drug offense, but found him guilty of possession of a firearm and simple possession of cocaine, a lesser included offense of the charge of possession with intent to distribute cocaine.

After trial, but before sentencing, Officers Wade and Mohr were indicted in state court for perjury in securing a search warrant in an unrelated case. That indictment alleged that the officers had falsely stated that a substance suspected to be cocaine had been submitted to the Evidence Control Section of the Baltimore City Police Department for chemical analysis. The evidence had not been submitted until after the warrants had been obtained and executed. Based on this indictment, Custis moved for a new trial. The district court deferred ruling on this motion until the sentencing hearing.

At the sentencing hearing, the government moved to have Custis's sentence enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), based on the prior convictions included in the notice of sentence enhancement. In response, Custis claimed that two of his prior convictions had been unconstitutionally obtained. He argued that his counsel for his 1985 burglary conviction was unconstitutionally ineffective and that his guilty plea was not knowing and intelligent. Custis also alleged that the 1989 conviction violated due process because he was not adequately advised of his rights before entering a plea. Custis further claimed that the 1989 conviction was for attempted breaking and entering rather than attempted burglary and thus was not a violent felony. The district court declined to hear Custis's arguments that two of his prior convictions had been unconstitutionally obtained, and found that all three convictions were for violent felonies, thus making him eligible for the sentence enhancement under section 924(e)(1). *United States v. Custis*, 786 F.Supp. 533, 537 (D.Md.1992).

After determining Custis's sentence, the district court heard his motion for a new trial based on newly discovered evidence. Fed.R.Crim.P. 33. The motion was based on the perjury indictments of Wade and Mohr. Finding that the indictments sufficiently undercut the credibility of those officers so as to justify a new trial, the district court granted Custis's motion. 786 F.Supp. at 538.

Subsequent to the district court's grant of the new trial, however, the state entered

a *nolle prosequi* (equivalent to a dismissal without prejudice) in the Circuit Court of Baltimore City dismissing all charges against Wade and Mohr. The government then filed a motion with the district court to reconsider its grant of a new trial, but because the government had already appealed that motion to this court, the district court concluded that it lacked jurisdiction over the government's motion.

We have before us now the government's appeal of the district court's grant of a new trial and Custis's cross-appeal of his sentence enhancement under section 924(e). We address these questions in turn.

II.

[1] The district court granted Custis's motion for a new trial on the basis of the indictments of Mohr and Wade for perjury in an unrelated case. The standard for granting a new trial is well established in this circuit:

> (a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Bales, 813 F.2d 1289, 1295 (4th Cir.1987) (quoting *Mills v. United States*, 281 F.2d 736, 738 (4th Cir.1960) (citations omitted)). On its face, the evidence offered by Custis fails to meet this standard—it is "merely impeaching." This circuit has emphasized that new evidence going only to the credibility of a witness does not generally warrant the granting of a new trial. *United States v. Stockton*, 788 F.2d 210, 220 (4th Cir.1986) (citing *United States v. Williams*, 415 F.2d 232, 233–34 (4th Cir.1969)).

While we have found no exception in this circuit to the general rule that a motion for a new trial requires a defendant to establish *each* of the five elements, *see United States v. Chavis*, 880 F.2d 788, 793 (4th Cir.1989), we need not rule that there can never be such an exception. There may be an exceptional "rare case" that would justify granting a new trial solely on the basis of newly discovered impeachment evidence. *See United States v. Taglia*, 922 F.2d 413, 415–16 (7th Cir.1991) (noting possible exception, but finding requirements for exception not satisfied). The exceptional circumstances identified by the Seventh Circuit in *Taglia* were, however, quite narrow: "If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." *Id.* at 415. This case does not fall into that narrow category.

[2] The state proceeding against Mohr and Wade involved an unrelated case, with issues that had no bearing on those at Custis's trial. Although perjured testimony is a matter of serious concern—and is especially repugnant when committed by an officer of the state—we are not prepared simply to presume these officers guilty of criminal misconduct. The district court made no factual findings concerning the conduct specified in the indictments and admitted that it lacked "detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact." 786 F.Supp. at 538 n. 4. The charges against the officers thus remain mere allegations, inadmissible under Fed.R.Evid. 609, *see United States v. Dennis*, 625 F.2d 782, 798 (8th Cir.1980), although defendant contends the underlying circumstances might prove to be admissible during cross-examination under Fed. R.Evid. 608(b). *See United States v. Leake*, 642 F.2d 715, 718–19 (4th Cir.1981).[1] In addition, all of the charges against the officers were dismissed after this appeal was taken, a factor which came too late for the district court to consider because it lacked jurisdiction. We are thus confronted on appeal with charges that are both unproven and unconnected to this case. It would not be appropriate to set aside the jury's verdict on such a basis.

1. The admissibility of this evidence seems problematic. There has never been any allegation in the unrelated case that the officers tampered with the evidence, failed to submit that evidence to the Evidence Control Section, or falsely represented the results of chemical analysis. Rather, the officers were charged with securing the search warrant before submitting the evidence for analysis. If the defendant raised this conduct on cross-examination, the government argues that it would be entitled to show in turn that the misstatements were inadvertent or immaterial, and to offer evidence of the officers' character. Custis's new trial might thus be sidetracked by a mini-trial on the allegations in the officers' indictment. Admissibility under Rule 608(b) is subject to the balancing test of Rule 403, *see* Fed.R.Evid. 608 advisory committee's note, which requires that the probative value of the evidence not be substantially outweighed by the prospect of confusion or delay.

The Second Circuit has emphasized that motions for a new trial based on impeaching evidence discovered after trial should be granted "only with great caution and in the most extraordinary circumstances." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir.1992) (citation omitted). In order to grant such a motion, "[t]here must be a real concern that an innocent person may have been convicted." *Id.* (footnote omitted). Such a concern is not present here. The testimony of Officer Hopson, who was not named in the indictments, is illustrative. His testimony recounting Custis's confession strongly supported the testimony of Wade and Mohr—and the jury's conclusion that Custis possessed the gun. In addition, Custis's own testimony of the events at the Springhill Market was largely consistent with that of the officers. Custis admitted that he had gone into the store with the cocaine, that he was crouched down picking up the cocaine when Officer Wade stopped him, that Officer Wade searched behind the video machines after stopping him, and that he told the officers that he would take the drug charge but not the gun charge. He differed with the officers only on the ultimate question of whether he possessed the gun and the eighteen bags of cocaine. The jury acquitted Custis of the intent to distribute charge, leaving only the question of the possession of the gun. The officers and Custis essentially agreed on the sequence of events leading up to Custis's arrest, and Custis's proximity to where the gun was found. Given these facts, we cannot say that the indictment was the sort of new evidence that "would probably produce an acquittal." *See Bales*, 813 F.2d at 1295. We conclude, therefore, that Custis has not established an exception to the general rule that the subsequent discovery of impeaching evidence does not justify a new trial.

III.

The district court enhanced Custis's sentence for his section 922(g) conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), because it found that he had three prior violent felony convictions. Custis claims that the district court erred when it refused to consider the constitutional validity of the challenged predicate convictions, one of which he claims was obtained in violation of his right to effective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and two of which he claims were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The district court declined to take evidence on the validity of these convictions. Initially, the court reasoned that *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), and *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), held that predicate convictions obtained in violation of the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), cannot be used to enhance a sentence. The court then assured itself that Custis had been represented by counsel in his prior convictions and, thus, that there had been no violation of *Gideon*.

[3] The fact that the court acted scrupulously in determining that Custis's right to counsel had been observed, however, did not oblige it to take evidence on Custis's three remaining claims. The *Gideon* violations at issue in *Burgett* and *Tucker* are different in kind from other constitutional errors, including those asserted by Custis here. When a defendant has been deprived of counsel, he has lost his ability to assert all his other constitutional rights, either because he is ignorant of those rights or because he lacks the background and experience to press them effectively. *Johnson*

v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Absent counsel, the judicial system has no assurance that the prior conviction reliably establishes the defendant's guilt. *See Linkletter v. Walker*, 381 U.S. 618, 639 n. 20, 85 S.Ct. 1731, 1743 n. 20, 14 L.Ed.2d 601 (1965). Without that reliability, even the federalism concerns that ordinarily counsel deference by federal courts to the judgments of state courts must give way. *See Tucker*, 404 U.S. at 448, 92 S.Ct. at 592. In recognizing the duty of district courts to entertain claims of *Gideon* violations in federal sentencing proceedings, we note that those claims will ordinarily lend themselves to facial review from the state court documents offered by the government to establish the conviction. The corresponding burden on courts and litigants should thus not be a heavy one. *See United States v. Jones*, 977 F.2d 105, 108 (4th Cir.1992) (*Jones II*) (uncounseled state court conviction is "prime example" of one "whose invalidity appears from available state court records.").

The same cannot be said, however, of the other claims pressed by Custis in his sentencing proceeding. Permitting defendants to challenge generally the constitutional validity of predicate convictions would place a substantial burden both on the prosecutors who will be forced to defend the predicate convictions used in sentence enhancement, and on the district judges who will be forced to hear those challenges. In this case, Custis raised no less than three separate constitutional challenges, all of them fact-intensive, to the validity of his prior convictions, which were several years old and which were from the state courts of Maryland. Requiring district courts to entertain such "first instance challenges to prior state convictions" poses a risk of unduly delaying and protracting the entire sentencing process. *Jones II*, 977 F.2d at 108–09. Even when the defendant's constitutional attack has no merit, establishing the validity of convictions that may be both geographically and temporarily distant presents considerable practical difficulties. Many of the challenged predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. *See Lopez v. Beto*, 405 U.S. 473, 500, 92 S.Ct. 1014, 1027, 31 L.Ed.2d 374 (1972) (Rehnquist, J., dissenting). This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. *Jones II*, 977 F.2d at 109. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process. *Id.* Beyond these practical difficulties, permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism. It is true that in a federal sentencing proceeding the state is not asserting a direct interest in the validity of its conviction, but any "challenge to the validity of a state conviction implicitly questions in at least some part the integrity of the state's judicial process." *United States v. Gaylor*, 828 F.2d 253, 255 (4th Cir.1987). A final judgment of conviction thus commands respect, in whatever forum and for whatever purposes it has come under challenge. The admonition that "[f]ederal courts are not forums in which to relitigate state trials," *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983), is not one that is limited to federal habeas corpus proceedings. In federal habeas corpus, Congress has at least provided a forum for the collateral review of state convictions. In federal sentencing proceedings, by contrast, the statutory mandate for reviewing predicate state convictions is far murkier.[2] The application of "the usual constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion" is, as the district court recognized, more problematic, even assuming that the presence of a procedural bar could be readily ascertained and asserted. 786 F.Supp. at 537. Given that federal sentencing proceedings are not the preferred forums for the review of state convictions, we have cautioned district courts that where a defendant has failed to attack his conviction on direct review or in a habeas

2. Congress has not specifically directed the federal courts to examine the validity of predicate convictions in sentencing proceedings. Nothing in 18 U.S.C. § 3661, which permits federal courts to consider any information concerning "the background, character, and conduct" of a defendant in sentencing, requires courts to entertain constitutional challenges to predicate convictions. *See United States v. Jones*, 907 F.2d 456, 466–67 (4th Cir.1990) (*Jones I*). Moreover, that statute is far less detailed than the federal habeas corpus procedures specified under 28 U.S.C. § 2254.

The Sentencing Guidelines also send conflicting signals on the propriety of entertaining constitutional challenges to predicate convictions. *Compare* U.S.S.G. § 4A1.2, comment. (n. 6) ("[S]entences resulting from convictions that a defendant shows to have been *previously ruled constitutionally invalid* are not to be counted.") (emphasis added) *with* U.S.S.G. § 4A1.2, comment. (backg'd) ("The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."). Not surprisingly, the courts have reached conflicting results. *Compare United States v. Jakobetz*, 955 F.2d 786, 805 (2d Cir.1992) (courts have discretion to entertain challenges) *with United States v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir.1991) (sentencing courts may only entertain challenges to already invalidated convictions). Even those courts that have allowed district courts to entertain attacks on predicate convictions have emphasized that they are not required to do so, and that considerations of finality and federalism counsel restraint in doing so. *See United States v. French*, 974 F.2d 687, 701 (6th Cir.1992). Finally, the district court concluded that constitutional challenges to predicate convictions under the Armed Career Criminal Act were precluded by the Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). In that case, the Court held that collateral challenges were not permitted under the predecessor statute to the substantive offense under which Custis was convicted, 18 U.S.C. § 922(g). Given our disposition of this case, we need not consider the applicability of *Lewis* to Congress's 1984 amendment adding the sentencing enhancement provisions of 18 U.S.C. § 924(e).

corpus proceeding, his "failure to have made the attempt will bespeak a recognized lack of basis for doing so, thus raising in question the basis now claimed for making the attempt in an even more attenuated collateral setting." *Jones II*, 977 F.2d at 109.

[4] For these reasons, we think that district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant. *Cf. Rose v. Clark*, 478 U.S. 570, 577–79, 106 S.Ct. 3101, 3105–07, 92 L.Ed.2d 460 (1986) (citing introduction of coerced confession, complete denial of right to counsel, adjudication by biased judge, and direction of guilty verdict by court as constitutional violations where prejudice can be presumed). *But see Arizona v. Fulminante*, — U.S. —, — - —, 111 S.Ct. 1246, 1263–66, 113 L.Ed.2d 302 (1991) (applying harmless error analysis to introduction of coerced confession).

[5, 6] We now apply this test to the district court's resolution of Custis's claims. Custis claims that he was deprived of effective assistance of counsel during the proceedings leading up to his 1985 burglary conviction. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to make out a claim of ineffective assistance of counsel, however, a defendant must show that counsel's errors *prejudiced* his defense, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. *See also Perry v. Leeke*, 488 U.S. 272, 278–80, 109 S.Ct. 594, 599–600, 102 L.Ed.2d 624 (1989) (distinguishing *Strickland* claims requiring showing of prejudice from denial of counsel claims in which prejudice is presumed). Finding prejudice from counsel's alleged errors necessarily entails a fact-intensive inquiry, requiring extensive reference to the record in the original state proceeding. *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). The court in *Jones II* recognized this problem and pointed to ineffective assistance of counsel claims as "notoriously" fact-specific, and "difficult of proof under any circumstances." 977 F.2d at 111.

[7–10] Custis also claims that two of his convictions were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). While prejudice to the defendant

can be presumed on direct appeal when the record does not affirmatively demonstrate that the defendant's plea of guilt was knowing, *see id.* at 244, 89 S.Ct. at 1713, this presumption does not carry over when a defendant attacks the intelligence of his plea collaterally. "On collateral review, we think it defies logic to presume from the mere unavailability of a transcript ... that the defendant was not advised of his rights." *Parke v. Raley*, — U.S. —, —, 113 S.Ct. 517, 524, 121 L.Ed.2d 391 (1992). *See also United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (absent showing of prejudice, Fed.R.Crim.P. 11 violation not cognizable in proceedings under 28 U.S.C. § 2255). When a defendant is represented by counsel when making his guilty plea, that plea is presumed valid when later attacked in a habeas corpus proceeding. *Marshall v. Lonberger*, 459 U.S. 422, 437, 103 S.Ct. 843, 852, 74 L.Ed.2d 646 (1983). In order to rebut that strong presumption of validity, the defendant must make a factual showing that his plea of guilt was not voluntary and intelligent. The appropriate forum for such a fact-intensive inquiry will typically be a state collateral proceeding or federal habeas corpus, not a sentencing hearing for a separate offense far removed from the original conviction.

[11] We conclude, therefore, that the district court did not err in declining to entertain Custis's constitutional challenge to the effectiveness of his counsel and to the validity of his guilty pleas. Those alleged violations did not carry with them the same presumption of prejudice that uncounseled pleas and convictions do. The multiple violations alleged by Custis could only have been established after fact-intensive investigations into state proceedings that are best undertaken in a different setting. Of course, if Custis is successful in making "a state or federal collateral attack upon the state sentence" during a habeas petition, for example, he may seek to revise any federal sentence in which the state conviction "was a factor." *Jones II*, 977 F.2d at 110 (citation omitted). No constitutional or statutory provision, however, obliges a federal sentencing court to entertain such challenges in the first instance.

IV.

Finally, Custis contends that his 1989 conviction in Maryland for attempted breaking and entering does not qualify as a violent felony for purposes of the sentencing enhancement in 18 U.S.C. § 924(e).[3] Custis contends that under Maryland law, attempted breaking and entering encompasses conduct such as lying in wait or reconnoitering the location of the crime. According to Custis, such conduct does not present "a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), and thus his attempted breaking and entering conviction should not count as a violent felony for sentencing.

[12] We disagree. The Supreme Court has instructed that the need for uniform sentencing under section 924(e) requires "a formal categorical approach, looking only to the statutory definition of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 2159, 109 L.Ed.2d 607 (1990). In applying such a categorical approach, we think that courts must necessarily make common-sense judgments about whether a given offense proscribes generic conduct with the potential for serious physical injury to another. The Maryland crime of which Custis was convicted includes as an element that the breaking and entering be into "the dwelling house of another." Md. Ann.Code art. 27, § 31A. *See also Warfield v. State*, 315 Md. 474, 554 A.2d 1238, 1249 (1989) (§ 31A intended to prohibit breaking and entering into "another person's home"). Such a building is likely to be occupied, thus creating a substantial risk of confrontation. *Compare United States v. Headspeth*, 852 F.2d 753, 758–59 (4th Cir.1988) ("storehouse breaking", Md. Ann.Code art. 27, § 32, held not to present a threat by its very nature because crime generally involved unoccupied buildings).

3. While this appeal was pending, the Circuit Court of Baltimore County entered an order deleting from the court file for Custis's 1989 conviction all references to "attempted burglary" and substituting the words "attempted breaking and entering." Custis filed a motion to supplement the record on appeal to reflect this order and we granted Custis's motion on January 22, 1993.

[13] In most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home. Interrupting an intruder while breaking into a home involves a risk of confrontation nearly as great as finding him inside the house. *United States v. O'Brien*, 972 F.2d 47, 52 (3d Cir.1992). We hold therefore that attempted breaking and entering "presents a serious potential risk of physical injury to another" and thus constitutes a violent felony for purposes of section 924(e)(2)(B)(ii). *Accord United States v. Payne*, 966 F.2d 4, 8 (1st Cir.1992) ("[R]isk of injury arises, not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring."). *See also United States v. Lane*, 909 F.2d 895, 903 (6th Cir.1990) (attempted burglary). *But see United States v. Strahl*, 958 F.2d 980, 986 (10th Cir.1992) (holding that attempted burglary does not qualify as a violent felony for section 924(e)); *United States v. Martinez*, 954 F.2d 1050, 1054 (5th Cir. 1992) (same).

V.

For the reasons given above, the case is remanded to the district court with directions to sentence defendant under 18 U.S.C. § 924(e) as an armed career criminal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

ORDER

Appellee/cross-appellant's petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

In a requested poll of the Court on the suggestion for rehearing en banc, Chief Judge Ervin and Judges Hall, Phillips, and Murnaghan voted to grant rehearing en banc; and Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, and Williams voted to deny rehearing en banc.

This panel considered the petition for rehearing and is of the opinion that it should be denied. In denying rehearing and affirming the sentence imposed by the district court, the panel does not wish to be construed as condoning the district court's treatment of this circuit's precedent. The district court ruling preceded this circuit's decision in *Jones II* and the district court was thus without the benefit of its guidance. Regrettably, however, in the court of its discussion, the district court attempted improperly to reject the majority opinion in *Jones I*, and to draw upon the dissenting opinion in that case as authority for its position. 786 F.Supp. at 536–37. It should not need to be remarked that it is the opinion of the panel majority that binds and governs district courts within this circuit.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the majority of active circuit judges voted to deny rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Russell and Judge Merhige (SUSDJ, ED/VA).

UNITED STATES of America

v.

Darren CUSTIS.

Crim. No. S 91-0334.

United States District Court,
D. Maryland.

March 16, 1992.

Defendant was found guilty of possessing cocaine and being a felon in possession of a firearm. At sentencing, the defendant sought to challenge prior convictions and made a motion for a new trial. The District Court, Smalkin, J., held that: (1) the defendant, who was being sentenced as an armed career criminal, could not collaterally attack prior convictions on the ground that he did not receive effective assistance of counsel, and (2) the interest of justice required granting a new trial after the arresting officers who had testified against the defendant were indicted for perjury in unrelated cases.

Motion for new trial granted.

1. Criminal Law ⇐700(3)

No *Brady* violation occurred when prosecutor failed to produce personnel files of police officers who testified against defendant; purpose of subpoenas for files was to determine whether files contained information relevant to new trial, and no information was contained in files requested before trial that would have been exculpatory.

2. Criminal Law ⇐986.2(4)

Prior convictions may not be used to enhance sentences if convictions are void for deprivation of opportunity to retain counsel or to have counsel appointed. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐1202.13

Defendant who was being sentenced as armed career criminal could not collaterally attack prior convictions on grounds that he had been deprived of effective assistance of counsel. 18 U.S.C.A. § 924(e); U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐944

New evidence addressing credibility of witnesses normally does not justify new trial. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

5. Criminal Law ⇐944, 945(2)

New trial was necessitated, in interest of justice, by arresting officers' indictments for perjury in unrelated cases; presence or absence of reasonable doubt in jurors' minds could be affected by knowledge of facts that affected credibility of arresting officers. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

Richard D. Bennett, U.S. Atty., Robert E. Sims and Thomas DiBiagio, Asst. U.S. Attys., Baltimore, Md., for plaintiff.

Fred Warren Bennett, Federal Public Defender, Tyler C. Johnston and Mary French, Asst. Federal Public Defenders, Baltimore, Md., for defendant.

MEMORANDUM OPINION

SMALKIN, District Judge.

This criminal case under the Armed Career Criminal Act, 18 U.S.C. § 924(e) is before the Court on issues regarding the sentencing of Mr. Darren Custis and his motion for new trial.

First, Mr. Custis has challenged the constitutional validity of his prior convictions, arguing, *inter alia*, that he was denied effective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as to two of his prior convictions. Mr. Custis contends that these convictions cannot be used to sentence him as a thrice-convicted armed career criminal. Thus, before addressing the arguments on the merits as to the various points raised by counsel going to the validity of the prior convictions, this Court examined the circumstances in which collateral attack should be allowed on prior convictions under 18 U.S.C. § 924(e). From its analysis, this Court now concludes that, with one narrow possible exception, collateral attacks on prior convictions should not be entertained at sentencing, for reasons that will be explained herein.

This opinion will also address the defendant's motion for new trial, based upon newly discovered evidence concerning the veracity of two Government witnesses. Specifically, two of the police officers who testified at the suppression hearing and at trial, and whose testimony constituted the principal evidence in support of Mr. Custis' conviction for possession of a firearm, have been indicted for perjury arising in the course of their work in an unrelated case. The indictments were filed after the trial in

this case, but before sentencing. The defendant argues that this new information concerning the officers seriously undermines confidence in the jury's guilty verdict on the firearms count in the present case. The Government, in turn, rejects the notion that a new trial should be granted upon these grounds. Because this Court finds that the law and the equities in this case support the grant of a new trial, defendant's new trial motion will be granted, as explained further below.

Factual Background

Mr. Custis was tried by jury in November of 1991 on a three-count indictment charging him with (1) possessing, with the intent to distribute, cocaine, (2) carrying a firearm in connection with a drug trafficking offense, and (3) possessing a firearm after having been convicted of a crime punishable by a term of imprisonment exceeding one year. At trial, three Baltimore City police officers testified on behalf of the Government. Two of the officers, Christopher Wade and John Mohr, originally arrested the defendant on state narcotics and firearms charges. As part of "Operation Triggerlock," a federal prosecution was undertaken pursuant to 18 U.S.C. §§ 922 and 924. A third officer testified regarding the defendant's purported admissions concerning the firearm. During the trial, Mr. Custis testified on his own behalf, admitting to possession of a small amount of cocaine for his personal use, but denying ownership and/or possession of the gun. After a three day trial, the defendant was convicted of the lesser-included offense of possession of cocaine, as well as the felon-in-possession of a firearm charge, in violation of 18 U.S.C. § 922(g) and § 924(e)(1), but was acquitted of the charge of carrying a firearm during the commission of a drug trafficking crime.

1. Perjury, although a misdemeanor under Maryland's common law classification of offenses, is punishable by 10 years' imprisonment. Md. Ann.Code of 1957 art. 27, § 439 (1992).

2. Prior to trial, the defendant had also moved *ex parte* for subpoenas for the police officers' personnel records. Those motions were denied, on the ground that the defendant had presented no particularized showing justifying the issuance of those subpoenas.

3. No information was contained in the files requested by defense counsel prior to trial that would have been exculpatory to the defendant under *Brady*.

[1] In February 199.. as the result of an investigation into an unrelated, earlier case conducted by the Baltimore City State's Attorney's Office, Officers Wade and Mohr were indicted for misdemeanor perjury, arising from allegedly false statements in applications for search warrants [1]. Subsequent to the indictment, defense counsel sought to obtain by subpoena all records regarding the state's investigation of these officers, as well as the officers' personnel records.[2] The purpose of the subpoenas was to determine whether or not those records contained information relevant to a motion for new trial. This Court subsequently quashed the subpoenas, pursuant to an Order requiring the prosecutor to submit an affidavit stating that, upon review, the records contained no *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), exculpatory information (including impeachment information) extant before the trial of Mr. Custis. The Court received the requisite affidavit prior to the sentencing hearing, and finds, on the basis of that affidavit and its attachments, that there was no violation of *Brady*[3] in the present case.

Collateral Attack on Prior Convictions Used to Calculate Armed Career Criminal Status

The Government here requests application of the Armed Career Criminal enhancement of 18 U.S.C. § 924(e) to Mr. Custis. The defendant must have been convicted of three prior violent felonies to trigger the enhancement, which raises the penalty for the felon-in-possession of a firearm charge under § 922(g) from a maximum of ten years to a minimum of fifteen years, with a maximum of life. 18 U.S.C. § 924(e)(1). Under U.S.S.G. § 4B1.4, the minimum possible guideline sentence is 188 months. Unlike the statutory scheme for enhancement of sentences in drug cases, the Armed Career Criminal Act provides no statutory right to challenge prior convictions relied upon by the Government for enhancement. *Compare* 18 U.S.C. § 924(e) *with* 21 U.S.C. § 851. Thus, the only relevant question is the extent to which any other statute, the Constitution itself, or case law gives the defendant such a right.

The only statute conceivably relevant is 18 U.S.C. § 3661, which provides simply that the Court may consider any relevant information at sentencing. That statute does little to shed light upon the present situation.

[2] The Constitution, as interpreted by the Supreme Court, appears to prohibit use of prior convictions to enhance sentences only where the convictions are void because the defendant was deprived of the opportunity to retain counsel, or, being indigent, was deprived of the opportunity to have counsel appointed. In other words, the conviction cannot be used to enhance only if it was obtained in violation of the rule in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). (For reasons that follow, even this narrow prohibition may not apply in § 924(e) cases.)

[3] This Court knows of no binding authority on the point from the United States Court of Appeals for the Fourth Circuit. Other circuits have addressed the issue of collateral attack upon prior convictions at sentencing and have allowed defendants to challenge prior convictions on constitutional grounds other than deprivation of the right to counsel, without specifically addressing the origin and nature of the "right" to raise the challenge, but simply allowing it to proceed. *See, e.g., United States v. Day*, 949 F.2d 973, 980–81 (8th Cir.1991). This Court's analysis of *Day* and the cases collected therein, though, leads to the conclusion that, to the extent the cases have extended the rule of *Tucker* and *Burgett* to entertain collateral attacks in cases not involving the frank deprivation of the right to any representation by counsel, they are unsound.

For example, the passage from *Tucker*, 404 U.S. at 448–49, 92 S.Ct. at 592–93, relied upon in *Day*, 949 F.2d at 981, simply does not extend to guilty pleas in which counsel has incompetently performed; rather, *Tucker* concerned itself only with defendants who had been cut off from any right to counsel at all. A guilty plea that can be attacked on ineffective representation grounds is very different from a situation where the defendant never was afforded the right to see a lawyer at all, but was nonetheless convicted. It is only the latter situation that is so fundamentally unfair that a resulting conviction cannot be used for enhancement later under *Tucker*. *See United States v. Graves*, 554 F.2d 65, 82 (3d Cir.1977), *cited with approval in Grandison v. Warden*, 580 F.2d 1231, 1240–41 (4th Cir.1978), *cert. denied*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979).

Furthermore, and most importantly, the decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), should be read as foreclosing *any* collateral attack, whether before conviction on the § 924(e) underlying gun offense or at sentencing for it, on a predicate conviction, even where the predicate conviction could otherwise be challenged under *Tucker* and *Burgett*. Although *Lewis* did not directly involve § 924(e), it construed a gun control statute (since repealed) essentially *in pari materia* with § 924(e)'s base offense (18 U.S.C. § 922(g)), *viz.*, 18 U.S.C.App. former § 1202(a). If, as it appears, a conviction void under *Tucker* could be used as a predicate for convicting someone of the substantive firearms offense under *Lewis*, *a fortiori* it can be considered at sentencing on that offense, immune from collateral attack. This Court recognizes that *Lewis*, 445 U.S. at 67, 88 S.Ct. at 922, distinguished *Burgett* but that distinction is neither logically supportable nor persuasive. If the "void" prior conviction is "reliable" enough to support indictment and conviction, it is logically "reliable" enough to be a predicate for an enhanced sentence.

Additionally, this Court's basis for precluding collateral attack at sentencing (on grounds other than, possibly, total deprivation of counsel) includes the persuasive arguments made by Judge Wilkinson in his dissent in *United States v. Jones*, 907 F.2d 456 (4th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 683, 112 L.Ed.2d 675 (1991). Judge Wilkinson's cogent dissent need not be reiterated here, save to point out that, if the scope of collateral review of state court convictions in a federal sentencing proceeding extends to any and all constitutional flaws, then the sentencing court will most likely be conducting a plenary collateral review of up to three predicate convictions in every sentencing under § 924(e), without any state court post-conviction record, and without the usual constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion. *See, e.g., Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Such a situation is folly, for the reasons stated by Judge Wilkinson in dissent in *Jones*, 907 F.2d at 470–84.

Finally, a word about *Jones* itself. *Jones* is not binding authority in this case, because it involved only construction and application of a (since repealed) provision of the Sentencing Guidelines, and it did not announce a supervisory or constitutional rule of general application in federal sentencings; neither does this Court consider *Jones* persuasive authority in this situation, for reasons amply stated above.

Thus, because defense counsel cannot establish that Mr. Custis, in his prior convictions, was denied the right to be represented by counsel (in fact, he was so represented), there is no occasion for any collateral review of those convictions at all during the sentencing proceedings. This Court is not, for reasons stated above, concerned with "ineffective representation" claims under the Sixth Amendment, Fourth Amendment claims, or claims of any sort other than the outright deprivation of the right to be represented under *Gideon*. Even if a predicate conviction was completely uncounseled, it is the opinion of the Court that *Lewis* would still bar collateral attack upon it, but that is a question upon which judgment need not be rendered in this case.

Motion for New Trial

Federal Criminal Rule 33 delineates the standard for a motion for new trial and provides, in pertinent part, that "[t]he court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice."

[4, 5] The Government, in its opposition to defendant's motion, correctly points out the general rule in this Circuit that new evidence going to the credibility of witnesses normally does not justify a new trial. *See, e.g., United States v. Stockton*, 788 F.2d 210, 220 (4th Cir.), *cert. denied*, 479 U.S. 840, 107 S.Ct. 147, 93 L.Ed.2d 89 (1986). The present case, however, goes well beyond the normal one, where some impeaching tidbit is turned up after trial. Indeed, this case is much closer to *United States v. Atkinson*, 429 F.Supp. 880 (E.D.N.C.1977). There, the court noted:

> Newly discovered evidence that merely goes to impeach the credibility of a prosecution witness does not ordinarily warrant the granting of a new trial, ... but in some circumstances the newly discovered evidence, although impeaching[,] is sufficiently important in the ascertainment of the truth and in the interests of justice that a new trial should be ordered.

Id. at 885 (citations omitted). In the present case, this Court's confidence in the outcome of this trial is so severely undermined by the indictment of the two key witnesses for perjury that, in fairness and justice, the verdict cannot stand.

Officers Wade and Mohr were the arresting officers in the present case; the jury's belief in their testimony regarding Mr. Custis' possession of the firearm was, in the Court's opinion, essential to a finding of guilt. Of course, during the new trial, the defendant cannot introduce evidence of the officers' alleged perjury under Fed.R.Evid. 609 unless and until the officers have actually been convicted of that offense. Under Fed.R.Evid. 608(b), however, the underlying circumstances would be open to cross-

examination, subject, of course, to Rule 403 and Fifth Amendment constraints. In the discretion of this Court, the full extent of the officers' misconduct, if any [4], could be addressed during cross-examination. The presence of reasonable doubt in the minds of the jury may be very much affected by knowledge of the conduct of these officers, and a different verdict may result. *See Atkinson*, 429 F.Supp. at 887. The Court has considered that another officer testified as to allegedly incriminating oral statements made by the defendant the morning after his arrest, before he had seen a magistrate, and after he had been held in custody all night. This questioning violated a general order of the Police Department, and the whole testimony of that officer is such that it does little to repair the Court's shaken faith in the integrity of the verdict.

It is a sad day when the Government's key law enforcement witnesses in a criminal case stand indicted for perjury. While it may be true that the defendant is in fact guilty, our system of justice is designed to insure him the right to a fair trial, where the jury knows all the relevant facts, especially when the credibility of arresting officers is at issue. In order to preserve that right, a new trial must be granted here in the interests of fairness and justice.[5]

For the reasons outlined above, an order will be entered separately, *granting* defendant's motion for new trial.

4. Of course, the Court does not purport to have detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact.

5. The Court is especially cognizant of the decrease in public confidence in the judiciary of England occasioned by recent revelations of police perjury during the 1970's, resulting from attempts to control the Irish Republican Army ("I.R.A."). This crisis of confidence in the independence and integrity of the English courts has led to demands for radical reform of the very mother of all common law courts. Trust in the English judiciary that had been built up by accretion—slowly over hundreds of years—is now going right out the window due to suspicion of police perjury. This Court cannot and will not tolerate even the hint of a like erosion of public confidence in the judiciary of this country. Sentencing Guidelines or no Sentencing Guidelines, Armed Career Criminal Act or no Armed Career Criminal Act, War on Drugs or No War on Drugs, Operation Triggerlock or no Operation Triggerlock, the basic principle underlying this Court's judgments must be to do that which is fair, just, and right.

APPENDIX C

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, Section 1, provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES

Maryland Annotated Code article 27, § 31A (1992)

Md. Ann. Code article 27, § 31A provides:

Any person who breaks and enters the dwelling house of another is guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to imprisonment for a term of not more than three (3) years or a fine of not more than five hundred dollars ($500.00) or both.

18 U.S.C. § 921, 922, and 924 (Supp. 1993); 18 U.S.C. § 3661 (1985)

1. 18 U.S.C. § 921(a)(20) states:

The term "crime punishable by imprisonment for a term exceeding one year" does not include --

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. 18 U.S.C. § 922(g) provides:

It shall be unlawful for any person --

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. 18 U.S.C. § 924(e) provides, in pertinent part:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection --

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

4. 18 U.S.C. § 3661 provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

APPENDIX C

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3. 18 U.S.C. § 924(e) provides, in pertinent part:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection --

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

4. 18 U.S.C. § 3661 provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

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DARREN J. CUSTIS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CERTIFICATE OF SERVICE

I hereby certify and declare that true and exact copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Motion for Leave to Proceed in Forma Pauperis were mailed, first-class postage prepaid, this 14th day of July, 1993, to all parties required to be served as follows: The Solicitor General, Department of Justice, Washington, D.C. 20530.

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